

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Purina Mills, Inc.

Serial No. 76/287,712

Matthew A. Rosenberg of Blumenfeld, Kaplan, Sandweiss, P.C.
for Purina Mills, Inc.

Mitchell Front, Trademark Examining Attorney, Law Office
111 (Craig Taylor, Managing Attorney).

Before Seeherman, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Purina Mills, Inc. to
register the mark shown below,

BirdLuvers Blend

for "bird food."¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the mark BIRD LOVERS COLLECTION, previously registered for "bird feeders and accessories therefor, sold together as a unit, namely, seed trays, hangers, poles, seed scoops and feed,"² as to be likely to cause confusion.³

Applicant has appealed. Briefs have been filed and an oral hearing was held before the Board.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the

¹ Serial No. 76/287,712, filed July 20, 2001. The application is based on an allegation of a bona fide intention to use the mark in commerce. The word "BLEND" is disclaimed apart from the mark as shown.

² Registration No. 2,303,464, issued December 28, 1999. The word "COLLECTION" is disclaimed apart from the mark as shown.

³ Registration was also finally refused on the ground that the drawing of the mark was not acceptable as a typed drawing. However, during the prosecution of the application and at the oral hearing, the Trademark Examining Attorney indicated that the drawing was acceptable as a special form drawing. Applicant's counsel, at the oral hearing, agreed to have the Office consider the drawing as a special form drawing, rather than as a typed drawing. This refusal, therefore, is moot.

likelihood of confusion factors set forth in *In re E.I. duPont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the goods. It is not necessary that goods be identical or even competitive in nature to support a holding of likelihood of confusion. It is sufficient if the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

The Examining Attorney, in support of his position that bird food and bird feeders are related, has made of record eleven use-based third-party registrations which show that entities have registered a single mark for both bird feeders and bird food.

Although the third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant asserts that a check of registrant's web site and an inquiry to registrant's toll-free telephone number reveal that registrant does not sell bird feed, only bird feeders; and that applicant's and registrant's goods travel in different channels of trade in that registrant's goods are available only through specialty retailers. Applicant further argues that the purchasers of applicant's and registrant's goods are sophisticated.

However, it is well settled that the issue of likelihood of confusion is determined on the basis of the goods as identified in the respective application and the cited registration, regardless of what the record may reveal as to the particular nature of those goods, their actual channels of trade, or the class of purchasers to whom they are in fact directed and sold. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1987). Because the

identification in the cited registration includes bird feed, we must presume that the goods are, in part, legally the same. Further, because registrant's identification is not limited to specialty retailers, we must deem registrant's goods to move in all normal channels of trade. These channels would include all places bird feeders are sold, including bird specialty stores, pet stores, home and garden centers, and mass merchandisers. These are some of the same channels of trade in which applicant's bird food would be sold. Thus, for purposes of our likelihood of confusion analysis, applicant's and registrant's goods are presumed to move in some of the same channels of trade.

Applicant also contends that the buying public for bird feeders and bird food is sophisticated. Aside from the fact that applicant has not submitted any evidence to support this contention, even if such evidence were properly of record, it would not affect our decision herein. In this case, neither applicant's nor registrant's identification is restricted as to class of purchasers. Thus, we must assume that both applicant's and registrant's goods are sold to ordinary consumers who simply enjoy seeing birds and use bird feeders/bird food to attract birds to their yards.

We find therefore that applicant's and registrant's goods are identical in part and otherwise closely related, and would be offered through some of the same channels of trade to the same classes of purchasers. Thus, it is clear that if such goods were to be sold under the same or similar marks, confusion as to source or sponsorship would be likely.

Turning then to a consideration of the marks, applicant raises several arguments. Applicant argues that the addition of the words BLEND and COLLECTION to the respective marks is sufficient to distinguish the marks; that the marks have different connotations; and that the marks look very different because applicant's mark depicts BIRDLUVERS as a single word and with the letter "U" instead of the letter "O."

Although we have carefully considered applicant's arguments, we agree with the Examining Attorney that when applicant's mark BIRDLUVERS BLEND (in stylized lettering) and registrant's mark BIRD LOVERS COLLECTION are each considered as a whole, they are highly similar in overall commercial impression.

Of course, it is the case that applicant's and registrant's marks must be considered in their entirety, including any disclaimed matter, since that is how the

marks appear when they are used in the marketplace. However, it is nonetheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight. Disclaimed or otherwise descriptive matter, for instance, is generally viewed as a less dominant or less significant feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751-52 (Fed. Cir. 1985).

Applying these principles to the marks at issue in this case, it is clear that the term BIRD LOVERS is the dominant portion of registrant's mark. The disclaimed word COLLECTION in registrant's mark is descriptive of registrant's bird feeders and accessories. Similarly, the term BIRDLUVERS is the dominant portion of applicant's mark and the disclaimed word BLEND is descriptive of applicant's bird food. Further, applicant's depiction of BIRDLUVERS as one word and with the letter "U" is not so unique as to distinguish the marks. The terms BIRD LOVERS and BIRDLUVERS are substantially similar in appearance and when spoken BIRD LOVERS and BIRDLUVERS sound the same. Also, although the differences in spelling would be apparent from a side-by-side comparison of the marks, a side-by-side comparison is not the proper test to be used in determining

the issue of likelihood of confusion since it is not the ordinary way that a prospective customer will be exposed to the marks. Thus, in finding that the marks are similar, we have kept in mind the normal fallibility of human memory over time and the fact that the average purchaser retains a general rather than a specific impression of trademarks encountered in the marketplace. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

With respect to applicant's contention that the marks have different connotations, we recognize that registrant's mark BIRD LOVERS COLLECTION may connote that registrant's goods are a collection of products, i.e., bird feeders and accessories. Applicant's mark BIRDLUVERS BLEND, on the other hand, connotes that the bird food is made up of a blend of bird food. Nonetheless, both marks connote that the respective products sold there under are for "bird lovers."

Purchasers who are familiar with registrant's BIRD LOVERS COLLECTION bird feeders are likely to believe, upon encountering BIRDLUVERS BLEND bird food, that the bird food is a companion product emanating from the same source as the BIRD LOVERS COLLECTION bird feeders. In other words, purchasers are likely to believe that BIRDLUVERS BLEND bird food is for use with BIRD LOVERS COLLECTION bird feeders.

Applicant's remaining arguments are that there is no evidence of any actual confusion and that there is no evidence that registrant's mark is famous. Although this is an intent-to-use application, applicant states that its mark has been in use since September 2001. This is a relatively short period of time of contemporaneous use and in the absence of any specifics about the extent of use of applicant's mark, it does not appear that there has been any meaningful opportunity for incidents of actual confusion to occur. Moreover, the issue before us is not one of actual confusion, but only the likelihood of confusion.

Finally, a mark need not be famous in order to be entitled to protection against a confusingly similar mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

We conclude that in view of the substantial similarity in the sound, appearance, connotation and overall commercial impressions of applicant's mark BIRDLUVERS BLEND, and registrant's mark BIRD LOVERS COLLECTION, their contemporaneous use on the identical in part and otherwise closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.